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A Closer Look at Loss of Chance under Nebraska Medical Malpractice Law: *Steineke v. Share Health Plan, Inc.*, 246 Neb. 374, 518 N.W.2d 904 (1994)

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Note*

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I. INTRODUCTION

Consider you are an attorney practicing medical malpractice law in Nebraska and a potential client confronts you with the following scenario. Herbie Husker, the strong-armed quarterback for the University of Nebraska football team, visited his doctor about pain in his left arm. The doctor examined him, took x-rays, and diagnosed a torn

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tricep, which was attributed to throwing the football too often. The doctor prescribed pain medication and advised Herbie to reduce his practice schedule. Six months later, after successfully leading Nebraska to its fifth national championship, Herbie was still suffering from pain in his left arm, which now had spread to his elbow. On the advice of his coach, he returned to see his doctor. This time, she diagnosed cancer.

Herbie's initial chance of survival with timely diagnosis of the cancer would have been 50%. Because of the delay in diagnosing the cancer, however, several experts agreed that the delay resulted in a diminished 40% chance of survival. Furthermore, the experts testified that they would have conducted additional tests during Herbie's initial visit, which is customary in the local medical community.

Herbie Husker now needs your advice. Although the standard of care was breached and the doctor's failure to timely diagnose the cancer was a direct cause of the loss of chance of survival, the question remains whether or not Herbie Husker can recover damages for his loss of chance of survival under Nebraska medical malpractice law.

The foregoing hypothetical represents a typical loss of chance tort cause of action in which a patient's initial chance of avoiding harm was "not better than even," and the patient suffered a reduction in that initial chance due to negligent medical care. At first glance, it appears that Nebraska does not recognize the loss of chance cause of action according to *Steineke v. Share Health Plan, Inc.*[1] Yet, upon further analysis, *Steineke* may support the adoption of loss of chance either as a cause of action or as an element of damages. Outside of Nebraska, a decreasing majority of jurisdictions still deny recovery to patients when their initial chance of avoiding harm was lower than 51%.[2] Courts justify this position because the patient is unable to demonstrate with reasonable medical certainty[3] that but for the negli-

1. 246 Neb. 374, 518 N.W.2d 904 (1994).

2. *See, e.g.*, Alfonso v. Lund, 783 F.2d 958 (10th Cir. 1986); Abille v. United States, 482 F. Supp. 703 (N.D. Cal. 1980)(applying Alaska law); Murdoch v. Thomas, 404 So. 2d 580 (Ala. 1981); Morgenroth v. Pacific Med. Ctr., Inc., 126 Cal. Rptr. 681 (Cal. Ct. App. 1976); Gooding v. University Hosp. Bldg., Inc., 445 So. 2d 1015 (Fla. 1984); Borowski v. Von Solbrig, 328 N.E.2d 301 (Ill. 1975); Watson v. Medical Emergency Servs. Corp., 532 N.E.2d 1191 (Ind. Ct. App. 1989); Walden v. Jones, 439 S.W.2d 571 (Ky. 1968); Fennell v. Southern Med. Hosp. Ctr., Inc., 580 A.2d 206 (Md. 1990); Wright v. Clement, 190 N.E. 11 (Mass. 1934); Cornfeldt v. Tongen, 295 N.W.2d 638 (Minn. 1980); Clayton v. Thompson, 475 So. 2d 439 (Miss. 1985); Wollen v. DePaul Health Ctr., 828 S.W.2d 681 (Mo. 1992); Pillsbury-Flood v. Portsmouth Hosp., 512 A.2d 1126 (N.H. 1986); Schenck v. Roger Williams Gen. Hosp., 382 A.2d 514 (R.I. 1977); Jones v. Owings, 456 S.E.2d 371 (S.C. 1995); Kilpatrick v. Bryant, 868 S.W.2d 594 (Tenn. 1993); Kramer v. Lewisville Mem'l Hosp., 858 S.W.2d 397 (Tex. 1993); Blondel v. Hayes, 403 S.E.2d 340 (Va. 1991).

3. The phrase "reasonable medical certainty" means more than a 50% chance.

gence, the harm could have been avoided. The recent trend, however, has been to allow patients recovery for any loss of chance, regardless of their initial chance.[4]

This Note first chronicles the development of loss of chance in medical malpractice litigation by focusing on the various approaches used by jurisdictions that recognize the cause of action. Second, this Note analyzes the Nebraska Supreme Court's position on whether or not to recognize loss of chance either as a cause of action or as an element of damages. Finally, this Note examines the valuation of damages and analyzes the policy considerations for adopting loss of chance in a medical malpractice legal regime.

II. LEGAL DEVELOPMENT OF LOSS OF CHANCE DOCTRINE

Steineke v. Share Health Plan, Inc. emits strong support for adopting loss of chance either as a cause of action or as an element of tort damages. Yet, because the Nebraska Supreme Court has not adopted loss of chance explicitly, understanding how loss of chance developed is necessary to analyze its current status and its future impact on Nebraska medical malpractice cases. Therefore, this section will lay out the traditional tort law principles and discuss how loss of chance fits within that framework, followed by a cursory overview of the various approaches used to allow recovery for loss of chance.

A. Traditional Tort Law Principles: All-Or-Nothing Approach

The typical medical malpractice case is a tort action in negligence.[5] Under common law negligence principles, a plaintiff must prove four elements: (1) the defendant owed the plaintiff a duty; (2) the defendant breached that duty; (3) the defendant's breach was both the legal cause-in-fact and the proximate cause of the plaintiff's injury; and (4) the plaintiff suffered some injury.[6] In loss of chance cases, the element of causation is the most difficult to prove. The traditional tort model requires the plaintiff to prove causation by a preponderance of

4. *See, e.g.*, Boody v. United States, 706 F. Supp. 1458 (D. Kan. 1989); Thompson v. Sun City Community Hosp., Inc., 688 P.2d 605 (Ariz. 1984)(adopted in part); DeBurkarte v. Louvar, 393 N.W.2d 131, 137 (Iowa 1986); Hastings v. Baton Rouge Gen. Hosp., 498 So. 2d 713 (La. 1986); Falcon v. Memorial Hosp., 462 N.W.2d 44 (Mich. 1990); Perez v. Las Vegas Med. Ctr., 805 P.2d 589 (Nev. 1991); Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480 (Ohio 1996); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467 (Okla. 1987)(adopted in part).

5. Robert S. Bruer, *Loss of a Chance as a Cause of Action in Medical Malpractice Cases*, 59 Mo. L. Rev. 969, 971 (1994).

6. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 30, at 164-65 (5th ed. 1984).

the evidence.[7] Under this standard, a plaintiff must prove that it is more likely than not that the defendant's negligence caused the patient's injury.[8]

The all-or-nothing approach to loss of chance falls within the traditional concepts of tort law.[9] *Jones v. Owings*[10] is representative of cases upholding the traditional tort model in causes of action involving loss of chance. In *Jones*, prior to the patient's treatment for a fractured left femur, the doctor administered a preoperative chest x-ray.[11] The radiology report from that x-ray noted abnormality in the upper left lung, and follow-up procedures were recommended.[12] Almost one year later, the radiologist took another preoperative x-ray. This time the radiology report specifically noted "probable scaring [of the] left upper lobe" and again recommended follow-up procedures.[13] Despite the recommendation, the patient's doctor took no action. Thereafter the patient was diagnosed with lung cancer and later died as a result.[14]

A wrongful death action was instituted by the patient's estate, alleging negligence by the doctor in failing to follow up on the radiologists' reports or informing the patient of the report recommendations.[15] At trial, expert testimony established that even with timely diagnosis after the initial x-ray, the patient's chance of survival was only approximately 50%.[16] By the time the cancer was discovered by the doctor, the patient's chance of survival was 20% to 25%.[17]

The Supreme Court of South Carolina denied the plaintiff's recovery, choosing instead to maintain the traditional approach. The court reasoned that "to comport with the standard of proof of proximate cause, plaintiff in a malpractice case must prove that defendant's negligence, in probability, proximately caused the death."[18] The court determined that to allow recovery without establishing but for causation would be "contrary to the most basic standards of proof which under-

7. *Id.* § 41, at 269.
8. *Id.*
9. *See* Joseph H. King, *Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981).
10. 456 S.E.2d 371 (S.C. 1995).
11. *Id.* at 372.
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 373-74 (citing Cooper v. Sisters of Charity, Inc., 272 N.E.2d 97 (Ohio 1971), *overruled by* Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480 (Ohio 1996)).

gird the tort system."[19] In other words, even though there is approximately a 50% chance that the doctor caused the patient's ultimate injury, if the plaintiff cannot demonstrate by a preponderance of the evidence that there was at least a 51% chance that the doctor caused the his harm, the negligent doctor triumphs.[20] But if the plaintiff can establish the requisite 51% chance that the doctor's actions caused the patient's harm, the patient prevails even though there is a 49% chance that the doctor did not cause the patient's ultimate injury.[21]

In the typical loss of chance case, as in *Jones*, the patient has less than a 50% chance of survival prior to treatment. So even with proper medical treatment, the patient would die. Therefore, the doctor's negligence is not the cause-in-fact (i.e., but for) of the patient's death. Accordingly, the plaintiff can never prove by a preponderance of the evidence that the defendant's negligence is a cause-in-fact of the injury, and, as in *Jones*, is denied recovery for his injury. This has led courts to create ways to circumvent the traditional tort rules to prevent the perceived injustice of the but for test.[22]

B. Evolution of Loss of Chance

The all-or-nothing approach is the traditional rule that denies recovery for a patient who had a less than 51% chance of survival prior to the alleged negligence.[23] This rule operates regardless of the diminution in chance caused by the doctor's negligence. This approach represents the diminishing majority view[24] mainly because of its simplicity and "rough justice."[25]

More recently, many jurisdictions have turned to the King approach, which compensates the plaintiff for the percentage of harm actually caused by the negligent doctor.[26] In addition, two other approaches have evolved that allow recovery for loss of chance based on a relaxed causation standard. Under one approach, if the plaintiff demonstrates that the defendant's negligence deprived the patient of a

19. *Id.* at 374. The court was persuaded by reasoning found in *Kilpatrick v. Bryant*, 868 S.W.2d 594, 602 (Tenn. 1993), and concluded that "the loss of chance theory of recovery is fundamentally at odds with the requisite degree of medical certitude necessary to establish a causal link between the injury of a patient and the tortious conduct of a physician." *Id.*

20. Lori R. Ellis, Note, *Loss of Chance As Technique: Toeing the Line at Fifty Percent*, 72 TEX. L. REV. 369, 384 (1993).

21. *Id.* at 383-84.

22. *Id.* at 383.

23. *See, e.g.*, Gooding v. University Hosp. Bldg., Inc., 445 So. 2d 1015 (Fla. 1984).

24. Michael J. Fox, *The Loss of Chance Doctrine in Medical Malpractice*, 33 A.F. L. REV. 97, 98 (1990).

25. Jack Rosati, *Causation in Medical Malpractice: A Modified Valuation Approach*, 50 OHIO ST. L.J. 469, 471 (1989).

26. *See* cases cited *supra* note 4.

substantial chance of survival,[27] then the plaintiff recovers 100% of the damages. This currently is the minority view[28] because, as one commentator put it, "[i]t is difficult to determine whether this approach is really a restatement of the all-or-nothing approach or if the courts are willing to compensate any loss."[29] The second approach, the Restatement (Second) of Torts section 323(a), has been used by a few jurisdictions, which allows the plaintiff to recover for any increased risk of harm caused by the defendant's negligence.[30]

1. King Approach

The fairest and most equitable of all loss of chance theories is the King approach. This approach compensates for the loss of chance regardless of whether the plaintiff had a 99% chance of survival or a 1% chance of survival at the time the negligent diagnosis was made.[31] Further, a plaintiff can recover whether or not death results after the negligent diagnosis. According to Professor King, courts should acknowledge injuries beyond just the plaintiff's death because

> even if the plaintiff is not entitled to recover for the loss of a chance of completely avoiding some specific harm, such as cancer-induced death, he might still be entitled to recover for the loss of a chance to slow the course of the disease or to mitigate its painful effects.[32]

A concurring opinion in *Herskovits v. Group Health Cooperative*[33] first contemplated the King approach, but Iowa was the first state to completely adopt it.[34] In *DeBurkarte v. Louvar*,[35] the Iowa Supreme Court analyzed a medical malpractice case in which the doctor's misdiagnosis of the plaintiff's condition resulted in the systemic spread of

27. *See, e.g.*, Jeanes v. Milner, 428 F.2d 598 (8th Cir. 1970); Richmond County Hosp. Auth. v. Dickerson, 356 S.E.2d 548 (Ga. Ct. App. 1987); Aasheim v. Humberger, 695 P.2d 824 (Mont. 1985); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467 (Okla. 1985); Whitfield v. Whittaker Mem'l Hosp., 169 S.E.2d 563 (Va. 1969); Thorton v. CAMC, Etc., 305 S.E.2d 316 (W. Va. 1983); Ehlinger v. Sipes, 454 N.W.2d 754 (Wis. 1990).

28. Rosati, *supra* note 25, at 472.

29. Beth Clemens Boggs, *Lost Chance of Survival Doctrine: Should the Courts Ever Tinker with Chance?*, 16 S. ILL. U. L.J. 421, 431 (1992).

30. *See, e.g.*, Thompson v. Sun City Community Hosp., Inc., 688 P.2d 605 (Ariz. 1984); Petriello v. Kalman, 576 A.2d 474 (Conn. 1990); Roberson v. Counselman, 686 P.2d 149 (Kan. 1984), *overruled by* Delaney v. Cade, 873 P.2d 175 (Kan. 1994); Scafidi v. Seller, 574 A.2d 398 (N.J. 1990); Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480 (Ohio 1996)(adopted in part); Hamil v. Bashline, 392 A.2d 1280 (Pa. 1978); Herskovits v. Group Health Coop., 664 P.2d 474 (Wash. 1983)(en banc).

31. King, *supra* note 9.

32. *Id.* at 1373.

33. 664 P.2d 474, 481 (Wash. 1983)(Pearson, J., concurring).

34. Boggs, *supra* note 29, at 437.

35. 393 N.W.2d 131 (Iowa 1986).

breast cancer.[36] The plaintiff sued the doctor, alleging that his failure to diagnose her cancer when removal of the cancerous tissue could have arrested it caused her to lose a chance of survival.[37] In adopting the King approach, the Iowa Supreme Court allowed recovery for the lost chance.[38] The court reasoned that it was better to recognize loss of chance as a recoverable injury than to deny a plaintiff recovery under the all or nothing approach.[39] The court stated that "[a]llowing recovery for the lost chance is the most equitable approach because 'but for the defendant's tortious conduct, it would not have been necessary to grapple with the imponderables of chance.'"[40]

Professor King's approach leaves untouched traditional tort law principles of causation. The approach requires courts to recognize a tort action and to award damages for the patient's loss of chance of survival.[41] By recognizing loss of chance as a tort action, the patient need prove only that the doctor was a proximate cause of the loss of chance,[42] rather than a proximate cause of the patient's death. As a result, negligent doctors are liable only for the resulting loss of chance.[43]

2. *Loss of Substantial Chance of Survival*

The substantial chance approach has been adopted by only a minority of jurisdictions.[44] To recover under this approach, the plaintiff must illustrate that the doctor's negligence cost the patient a "substantial chance" of survival.[45] The Eighth Circuit Court of Appeals utilized this approach in *Jeanes v. Milner*.[46] In *Jeanes*, the patient's cancer was misdiagnosed as a throat infection. As a direct result, the cancer became systemic, and the patient subsequently died. If the cancer had been timely treated, there would have been a 35% chance of survival. Although the court recognized that medicine is an inexact science and that causation cannot be proved by a medical certainty,[47]

36. *Id.* at 132.
37. *Id.*
38. *Id.* at 137.
39. *Id.*
40. *Id.* (quoting Joseph H. King, *Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1378 (1981)).
41. King, *supra* note 9, at 1372-73.
42. *Id.* at 1376-82.
43. Boggs, *supra* note 29, at 438.
44. Patricia L. Andel, *Medical Malpractice: The Right to Recover for the Loss of a Chance of Survival*, 12 PEPP. L. REV. 973, 982 (1985).
45. *See* Hicks v. United States, 368 F.2d 626 (4th Cir. 1966).
46. 428 F.2d 598 (8th Cir. 1970).
47. *Id.* at 604.

it nevertheless held that the question of causation was for the jury even though the chance of survival was less than 50%.[48]

The general tort law concern for compensating an individual who has been wrongly injured by the negligence of another is reflected in the substantial chance approach.[49] By assigning a value to chance,[50] courts attempt to rectify the inequity of the all-or-nothing approach, which allows recovery if the original chance of survival was 51%, but denies recovery to all plaintiffs not meeting this threshold.[51]

Although this approach addresses the general tort concern for compensation, most jurisdictions decline to adopt it because it requires "tampering with the standard of proof."[52] Rather than focusing on the patient's loss of chance due to the doctor's negligence, this approach incorrectly focuses on death as the injury to be compensated.[53] As noted earlier, under the all-or-nothing approach, the standard for causation is that it is more likely than not that death is the compensable injury.[54] Therefore, this approach allows recovery only by adjusting the burden of proof away from a preponderance of the evidence as traditional tort law requires.[55] It is the loss of chance of a prolonged life that should be compensated, not the unfavorable result itself.[56] Therefore, due to this "fundamental flaw" in the all-or-nothing approach, courts have chosen to apply the King or other similar approaches.[57]

3. *Restatement (Second) of Torts*

The Restatement (Second) of Torts section 323(a) represents the final alternative for recovery in loss of chance cases. This approach, like the substantial chance approach, relaxes the standard of proof.[58] Section 323(a) provides that

> [o]ne who undertakes, gratuitously or for consideration, to render services to another as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to

48. *Id.* at 605.
49. Boggs, *supra* note 29, at 431.
50. Fox, *supra* note 24, at 100.
51. Boggs, *supra* note 29, at 431.
52. *Id.*
53. *Id.* at 432 (quoting Joseph H. King, *Causation, Valuation and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1364 (1981)).
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. Howard Ross Feldman, Comment, *Chances as Protected Interests: Recovery for the Loss of Chance and Increased Risk*, 17 U. BALT. L. REV. 139, 145-46 (1987).

> exercise reasonable care to perform his undertaking, if: (a) his failure to exercise such care increases the risk of such harm.[59]

Under this approach, the doctor is liable for the harm caused to a patient if the care rendered increases the risk of harm.[60] Therefore, if the doctor's negligence is a substantial factor in causing the patient's harm, then the doctor is liable.[61]

Ohio most recently adopted the Restatement approach, overturning a twenty-five year precedent of applying the all-or-nothing approach to loss of chance cases. In *Roberts v. Ohio Permanente Medical Group, Inc.*,[62] the decedent's lung cancer was neither timely diagnosed nor treated by the defendant.[63] A wrongful death action was brought by the plaintiff, executor of the decedent's estate, alleging the defendant was negligent in failing to properly diagnose the decedent's lung cancer for seventeen months.[64]

Prior to trial, expert testimony established that even with proper and timely diagnosis, the decedent's chance of survival would have been only 28%.[65] Following Ohio precedent,[66] the trial court granted the defendant's motion for summary judgment since the plaintiff did not establish that the defendant's negligence was the proximate cause of the decedent's death.[67]

On appeal, however, the Ohio Supreme Court reversed, recognizing loss of chance as a cause of action under the Restatement approach. In overturning its own twenty-five year precedent, the Ohio Supreme Court reasoned that

> [t]he time has come to discard the traditionally harsh view we previously followed and to join the majority of states that have adopted the loss of chance theory. A patient who seeks medical assistance from a professional caregiver has the right to expect proper care and should be compensated for any injury caused by the caregiver's negligence which has reduced his or her chance of survival.[68]

Therefore, once the plaintiff demonstrates through expert testimony that the defendant's negligence increased the risk of harm to the patient, then "it then becomes a jury question as to whether the defendant's negligence was a cause of the plaintiff's injury or death."[69]

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59. RESTATEMENT (SECOND) OF TORTS § 323(a) (1965).
60. Fox, *supra* note 24, at 100.
61. *Id.*
62. 668 N.E.2d 480 (Ohio 1996).
63. *Id.* at 481.
64. *Id.*
65. *Id.*
66. *See* Cooper v. Sisters of Charity, Inc., 272 N.E.2d 97 (Ohio 1971), *overruled by* Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480 (Ohio 1996).
67. Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480, 481 (Ohio 1996).
68. *Id.* at 484.
69. *Id.*

Although this approach to loss of chance cases attempts to compensate for the patient's increased risk of harm, damage awards are not adjusted to reflect only the percentage of harm actually caused by the doctor's negligence.[70] Thus, it is similar to the all-or-nothing approach because it allows 100% recovery and thereby overcompensates the plaintiff.[71] It differs from the King approach by altering the standard of proof for causation,[72] and it differs from the substantial chance approach by allowing any percentage of loss to be submitted to the jury.[73] One commentator has noted that "[c]ases applying section 323(a) employ language from all of the other approaches, so, in its essence, it is a hybrid of all the other approaches and not a very good one."[74]

III. NEBRASKA COMMON LAW

Although loss of chance of survival is widely accepted in other jurisdictions,[75] Nebraska has yet to adopt it explicitly as a cause of action. Nonetheless, the court will implicitly support loss of chance given reasonable medical certainty that damages were caused by the alleged negligence.[76] Yet, even if the Nebraska Supreme Court implicitly supports the adoption of loss of chance, it is uncertain which approach the court will choose to adopt.

A. Recognizing Loss of Chance in Nebraska

Steineke v. Share Health Plan, Inc.[77] emits strong support for adopting loss of chance either as a cause of action or as an element of tort damages. In *Steineke*, the plaintiff had an ectopic pregnancy.[78] Her health care provider insisted she have the necessary emergency surgery at a different hospital than the one where she was admitted. If Steineke had chosen to remain at the first hospital, she would have been responsible for the cost of her care. After transferring to the sec-

70. Boggs, *supra* note 29, at 433. *See also* Delaney v. Cade, 873 P.2d 175, 187 (Kan. 1994)(stating that the valuation approach for calculating loss of chance damages lacks precision). *But see* Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480, 484-85 (Ohio 1996)(adopting the Restatement approach for causation, but adopting the King approach for calculating damages).

71. Boggs, *supra* note 29, at 441.

72. Donna H. Smith, Note, *Increased Risk of Harm: A New Standard For Sufficiency of Evidence of Causation in Medical Malpractice Cases*, 65 B.U. L. REV. 275 (1985).

73. Boggs, *supra* note 29, at 433.

74. *Id.*

75. *See* cases cited *supra* note 4.

76. *See* Steineke v. Share Health Plan, Inc., 246 Neb. 374, 518 N.W.2d 904 (1994).

77. *Id.*

78. An ectopic pregnancy is one in which a fertilized ovum develops outside the uterine cavity. *Id.* at 376, 518 N.W.2d at 906.

ond hospital, the plaintiff was told that the doctors would be unable to save either the fetus or her fallopian tube because "that procedure" was not done there. In contrast, the first hospital did perform the necessary procedure to possibly save the tube and fetus. Steineke signed a written consent at the second hospital acknowledging that neither her fetus nor her remaining fallopian tube could be saved.

Steineke sued her provider for the lost chance of fertility due to the lost tube. Steineke argued her loss of chance to keep her only remaining fallopian tube and her loss of chance to conceive and bear children was a direct result of her provider's overriding judgment to have her moved to the second facility.[79] The court rejected the loss of chance doctrine because Steineke "cited no authority, nor [has this court] discovered any, that Nebraska recognizes loss of chance as a cause of action or as an element of damages in either tort or contract cases."[80]

Although the majority opinion explicitly declined to adopt the loss of chance doctrine in *Steineke*,[81] the dissent cited *Washington v. American Community Stores Corp.*,[82] a Nebraska case recognizing the loss of chance doctrine as a element of tort damages.[83] In *Washington*,[84] the plaintiff, a twenty-four-year-old parole officer, was involved in a car collision and brought a personal injury suit claiming that his injuries prevented him from pursuing a wrestling career. Expert testimony indicated that prior to the injury Washington was a prime candidate for the United States Olympic team and had the potential to win a medal and become a great international wrestler.[85] Evidence suggested that those who compete in the Olympics and win a medal have a better opportunity to become a coach or professional wrestler. The court permitted recovery for the loss of chance, rejecting the argument that the claim of damages was speculative and conjectural because it rested on uncertain future possibilities and uncertain future happenings.[86] Based on this decision, Judge Caporale concluded that Nebraska precedent supported recognizing loss of chance as an element of tort damages.[87]

In addition, the *Steineke* court looked to principles of contract law to determine whether the provider's alleged breach of contract was a

79. *Id.* at 378, 518 N.W.2d at 907.
80. *Id.*
81. *Id.*
82. 196 Neb. 624, 244 N.W.2d 286 (1976).
83. Steineke v. Share Health Plan, Inc., 246 Neb. 374, 381, 518 N.W.2d 904, 908 (1994)(Caporale, J., dissenting).
84. Washington v. American Community Stores Corp., 196 Neb. 624, 244 N.W.2d 286 (1976).
85. *Id.* at 627, 244 N.W.2d at 288.
86. *Id.* at 629, 244 N.W.2d at 289.
87. Steineke v. Share Health Plan, Inc., 246 Neb. 374, 381, 518 N.W.2d 904, 909 (1994)(Caporale, J., dissenting).

proximate cause of Steineke's alleged damages.[88] Steineke's expert medical witness testified in his deposition that there would have been a better chance of saving her fallopian tube had the plaintiff been treated at the first hospital.[89] Because medical opinions must be based on reasonable medical certainty,[90] the court found the expert's testimony "couched in terms of 'possibility,'"[91] and therefore "insufficient to support a causal relationship."[92] The court concluded that because Steineke failed to show "to a reasonable medical certainty that her alleged damages were proximately caused by [the provider's] alleged breach . . . Steineke has failed in her burden to present evidence creating an issue of material fact . . . ."[93] Therefore, by considering whether Steineke had established a causal connection between the provider's breach and her alleged loss of the chance to conceive, loss of chance is necessarily recognized in the majority opinion.[94] Indeed, this analysis led Chief Justice White in his concurring opinion to agree with the court's decision.[95] He concluded, however, that "[t]he opinion is inconsistent with its summary declaration that this jurisdiction will not recognize loss of chance as a cause of action or an element of damages in either contract or tort cases."[96]

Moreover, the majority of the *Steineke* court did recognize loss of chance as an element of tort damages in Nebraska. First, in concurring, Chief Justice White, joined by Judge Wright, unequivocally recognized the loss of chance doctrine "to the extent that it would allow recovery for the loss of chance to conceive."[97] Second, Judge Caporale, who was joined by Judge Lanphier in dissent, cited precedent that the Nebraska Supreme Court already recognized loss of chance as an element of tort damages[98] Thus, four of seven members of the Nebraska Supreme Court recognized loss of chance in Nebraska.[99] It is important to note, however, that all three remaining judges in the majority have since left the court, and it remains uncertain where the new judges stand on this issue.

88. *Id.* at 378-80, 518 N.W.2d at 907-08.
89. *Id.* at 379, 518 N.W.2d at 907.
90. *Id. See also* Caradori v. Frontier Airlines, Inc., 213 Neb. 513, 517, 329 N.W.2d 865, 867 (1983).
91. Steineke v. Share Health Plan, Inc., 246 Neb. 374, 379, 518 N.W.2d 904, 907 (1994).
92. *Id.*
93. *Id.* at 379, 518 N.W.2d at 908.
94. *Id.* at 380, 518 N.W.2d at 908 (White, J., concurring).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* at 381, 518 N.W.2d at 909.
99. Chief Justice Hastings, Judge Fahrnbruch, and Judge Boslaugh have since left the court.

B. Future of Loss of Chance in Nebraska

To the extent the Nebraska Supreme Court recognized loss of chance, *Steineke* is useful because it opens the door for future loss of chance litigation. Yet, because Steineke was unable to establish to a reasonable degree of medical certainty that her fallopian tube could have been saved had she remained at the first hospital, the court did not have to address how loss of chance would be applied in future cases. To this extent, *Steineke* leaves much room for speculation. Will the court adopt loss of chance doctrine as a separate cause of action or leave it as an element of tort damages that would require loss of chance to be preceded by some other tangible, physical injury? Whatever the court decides in the future as to this issue, it also is uncertain whether the court will join the recent trend and adopt the King approach or whether it will follow the decreasing majority and adopt the all-or-nothing approach to determine the outcome in loss of chance cases. The court's strict adherence to the reasonable medical certainty standard, however, strongly suggests that the substantial chance and the Restatement approaches to loss of chance will not be adopted because each requires tinkering with the standard of proof.[100]

The concurring opinion recognized the loss of chance doctrine as a cause of action,[101] but noted that Steineke's inability to establish to a reasonable degree of medical certainty that her fallopian tube could have been saved but for the provider's breach eliminated her right to recover for her loss of chance.[102] This requires some explanation. Obviously, for Steineke's loss of chance to be actionable, she must have had an initial chance to conceive. Among other things, a chance to conceive requires a functional fallopian tube. Steineke's loss of chance to conceive was predicated on her ability to establish that her fallopian tube more likely than not could have been saved but for the provider's breach. If Steineke had established to a reasonable degree of medical certainty that her fallopian tube could have been saved by remaining at the first hospital, she would have had an initial chance to conceive, and her loss of chance claim would have been actionable. To allow Steineke to recover for her loss of chance without establishing an initial chance to conceive would produce a windfall to the plaintiff and thus strain the traditional tort principle of returning parties to status quo.

To recover for loss of chance as a tort action, the plaintiff need prove only that the doctor is a proximate cause of the loss of chance.[103] If the plaintiff can establish to a reasonable medical certainty a causal

100. Boggs, *supra* note 29, at 432.
101. Steineke v. Share Health Plan, Inc., 246 Neb. 374, 380, 518 N.W.2d 904, 908 (1994)(White, J., concurring).
102. *Id.*
103. King, *supra* note 9, at 1376-82.

connection between the doctor's negligence and the patient's loss of chance, the plaintiff meets the burden of proof and will recover damages. This recovery occurs regardless of the patient's initial chance of avoiding harm.

As the dissent illustrated, Nebraska previously has recognized loss of chance as an element of tort damages.[104] Uncertainty arises because the opinion does not comment on the how the standard of reasonable medical certainty would be applied. Whether the standard is applied within the framework of the all-or-nothing approach or the King approach definitely will affect the number of plaintiffs able to recover, as well as the amount recoverable.

To better illustrate, assume Steineke could establish to a reasonable degree of medical certainty that her fallopian tube could have been saved but for the provider's breach. Additionally, through expert medical testimony, assume Steineke could establish that her chance to conceive had decreased from 50% to 0% as a direct result of the destroyed fallopian tube. Based on this evidence, Steineke could prove the provider was the proximate cause of the loss of chance and was responsible for at least 51% of the 50% loss. Because Steineke's initial chance to conceive was only 50% prior to the provider's breach, her damage recovery would be determined by the court's application of the reasonable medical certainty standard. If the standard is applied to the patient's initial chance to conceive, the patient could be denied recovery even though the doctor's negligence resulted in a 50% loss of chance. In this case, there is no cause of action because it was not more likely that the patient would have conceived but for the doctor's negligence. Conversely, if the standard is applied to the loss of chance itself, Steineke would recover because there was reasonable medical certainty as to the 50% loss of chance. In other words, judicial adoption of the all-or-nothing approach would lead to no recovery for Steineke for her loss of chance to conceive. Yet, by recognizing the King approach to loss of chance, Steineke would recover for the 50% reduction in her chance to conceive.

IV. ARGUMENTS OF POLICY

Although *Steineke* recognized adopting loss of chance either as a tort action or as an element of tort damages, the Nebraska Supreme Court does not specify the approach it will apply in future cases. Because only three judges joined on this issue, in future cases the court is free and may be persuaded to follow the movement of the majority of jurisdictions adopting loss of chance as an actionable tort. Attorneys then will be in a position to make policy arguments to influence

104. Steineke v. Share Health Plan, Inc., 246 Neb. 374, 381, 518 N.W.2d 904, 909 (1994)(Caporale, J., dissenting).

the approach the Nebraska Supreme Court ultimately adopts. Before focusing on potential policy considerations, it is important to address the valuation of damages under each approach to loss of chance. Damages are a necessary element to any tort action and their valuation will be useful in formulating policy arguments.

A. Damage Award Valuation

The final element in any negligence claim, including medical malpractice, is damages.[105] There are only two logical approaches to damage awards in loss of chance cases.

The first approach to awarding damages is to award full compensation without regard to the actual loss of chance.[106] This approach, embraced by the all-or-nothing, substantial chance, and the Restatement approaches, results in gross inequities.[107] First, it is too burdensome for doctors who are forced to compensate plaintiffs for the percentage of harm their negligence did not cause and that may have occurred despite the doctor's conduct.[108] As a result, plaintiffs receive windfalls in compensation.

The second approach to damages is to compensate plaintiffs for their actual loss of chance.[109] This method, embraced by the King approach, is both consistent and fair and avoids the inequities of the first approach.[110] Simply put, compensation is determined by multiplying the value of life without the harm by the percentage of chance lost.[111]

To illustrate the different approaches, consider the following example. A patient's initial chance of survival with timely diagnosis of the cancer was 55%. Several experts agreed that the delay in diagnosing the patient's cancer was critical and most certainly resulted in a 20% loss of chance of survival. If the jury believes the plaintiff's expert testimony and values the patient's life at $3 million, under the first approach the doctor is liable for $3 million even though the doctor's negligence caused only a 20% loss of chance. On the other hand, if the compensation is awarded for only the actual loss of chance, the negli-

105. Boody v. United States, 706 F. Supp. 1458, 1465 (D. Kan. 1989).
106. *Id.*
107. *Id. See also* Thompson v. Sun City Community Hosp., 688 P.2d 605, 615-16 (Ariz. 1984).
108. Boody v. United States, 706 F. Supp. 1458, 1465 (D. Kan. 1989).
109. *Id.*
110. *Id.* at 1466.
111. *Id.* This approach, the percentage apportionment of damages method, has been followed by many courts. *See, e.g.*, Mays v. United States, 608 F. Supp. 1476, 1482-83 (D. Colo. 1985), *rev'd*, 806 F.2d 976 (10th Cir. 1986); DeBurkarte v. Louvar, 393 N.W.2d 131, 137 (Iowa 1986); Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480, 484-85 (Ohio 1996); McKellips v. Saint Francis Hosp., Inc., 741 P.2d 467, 476 nn.25-26 (Okla. 1987); Herskovits v. Group Health Coop., 664 P.2d 474, 487 (Wash. 1983)(Pearson, J., concurring).

gent doctor is liable for $600,000—the value of life multiplied by the percentage of chance lost. Therefore, an application of the first approach to damage awards places an unfair burden on the doctor, and yields to the plaintiff a windfall in compensation equal to $2.4 million.

B. Policy Considerations

In loss of chance actions, if a doctor fails to meet the requisite standard of care demanded by the law, she can be held liable.[112] This liability merely shifts the losses sustained by the person who is injured to the one who caused the harm,[113] i.e., returning the injured party to status quo. Because any loss of chance makes a person worse off, this general premise of tort liability calls for the compensation of this loss regardless of the patient's initial loss of chance.

Patients deserve reasonable medical care regardless of whether or not their initial chance of survival was greater than 50%.[114] If a doctor fails to provide the best medical care, and a patient's chance of survival declines as a result, then the doctor should be unable to avoid liability because the patient's chance of survival was less than 51%. As the Kansas Supreme Court stated,

> [t]he reasoning of the district court herein [which rejected loss of chance as a cognizable tort] . . . in essence, declares open season on critically ill or injured persons as care providers would be free of liability for even the grossest malpractice if the patient had only a fifty-fifty chance of surviving the disease or injury even with proper treatment.[115]

Professor King also has provided policy reasons for recognizing loss of chance, noting that the all-or-nothing approach "subverts the deterrent objectives of tort law by denying recovery for the effects of conduct that causes statistically demonstrable losses."[116] In other words, the all or nothing approach creates an incentive for a doctor to breach his duty of care to the patient whose chance of survival is less than 51%. Obviously, this assumes that a doctor knows which patients have a less than 51% chance of survival.[117] Even so, one commentator noted that the increased risk of tort liability alone would act as "a useful spur to the medical community to exercise due care in the diagnosis and treatment of typically fatal diseases and conditions."[118]

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112. Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238, 239 (1944).
113. *Id.* at 238.
114. *See* Roberts v. Ohio Permanente Med. Group, Inc., 668 N.E.2d 480 (Ohio 1996).
115. Roberson v. Counselman, 686 P.2d 149, 160 (Kan. 1984), *overruled by* Delaney v. Cade, 873 P.2d 175 (Kan. 1994).
116. King, *supra* note 9, at 1377.
117. Boggs, *supra* note 29, at 440.
118. Warner Miller, Note, Herskovits v. Group Health Cooperative: *Negligent Creation of a Substantial Risk of Injury is a Compensable Harm*, 9 U. PUGET SOUND L. REV. 251, 254-55 (1985).

The King approach may substantially affect a doctor's examination of a patient.[119] Advocates assert that adopting this approach will lead to better quality of patient care.[120] Critics, however, assert that the King approach would lead only to defensive medicine, which leads to increased cost of medical treatment.[121] The concern is that defensive medicine is contrary to the current climate of cost containment in medical care.[122] In retort, as the quality and efficiency of medical care are enhanced by the deterrence proffered by the King approach, insurance costs are likely to be reduced.[123] Therefore, the overall cost of medical care could remain constant.[124]

An additional concern with the King approach is that it may lead to an increase in liability for doctors,[125] causing the overall cost of medical care to increase.[126] While application of the King approach may cause the overall number of lawsuits and plaintiff verdicts to increase, as the number of potential plaintiffs rises, the amount of each award will reflect only the loss of chance caused by the negligence.[127] As a result, the reduction in damage awards to plaintiffs who once had viable causes of action under the all-or-nothing approach should offset the additional judgments.[128] In fact, some have argued that incidents of medical malpractice would decrease because doctors would have the incentive to more carefully treat patients.[129] If this is true, the overall cost to doctors actually would decrease.[130] In reality, however, "[r]ecognizing loss of a chance may or may not affect the costs of medi-

119. Boggs, *supra* note 29, at 441.
120. King, *supra* note 9, at 1377.
121. Lisa Perrochet et al., *Lost Chance Recovery and the Folly of Expanding Medical Malpractice Liability*, 27 TORT & INS. L.J. 615, 625 (1992).
122. *Id.*
123. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 6.14, at 186-87 (1986).
124. Feldman, *supra* note 58, at 150-51. The amount of increased medical care by doctors will also lead to a more efficient result as precautions will increase only to the point were the cost of the increase in care equals the benefit of avoiding liability. *See* POSNER, *supra* note 123, § 6.1.
125. Boggs, *supra* note 29, at 442.
126. *See generally* Perrochet et al., *supra* note 121.
127. *Id.* When the patient's chance of survival is reduced from 45% to 25%, the plaintiff will receive only 20% of the value of the decedent's life. Feldman, *supra* note 58, at 155.
128. Boggs, *supra* note 29, at 442. In the all-or-nothing approach of traditional tort law, the plaintiff who can prove the patient's initial chances of survival is greater than 50%, the plaintiff will recover 100% of the value of damages even though the plaintiff could not prove to a 100% degree of certainty that the doctor caused the death of the patient. Falcon v. Memorial Hosp., 462 N.W.2d 44, 47 (Mich. 1990). Professor King finds the inequity "as questionable as the extreme reached when the all-or-nothing concept denies any redress for the destruction of a not-better-than-even chance." King, *supra* note 9, at 1387.
129. Feldman, *supra* note 58, at 151.
130. Kevin Joseph Willging, Note, Falcon v. Memorial Hospital: *A Rational Approach to Loss-of-Chance Tort Actions*, 9 J. CONTEMP. HEALTH L. & POL'Y 545, 560 (1993).

cal care. While impressive statistics can be marshalled by both supporters and opponents of the rule, it seems impossible to conclusively determine the impact of loss of a chance upon medical care costs."[131]

Courts' strongest opposition to adopting loss of chance is fear that excessive use of statistics and probabilities offered by both sides would confuse a jury and lead to an unworkable system for medical malpractice jurisprudence.[132] In response to this concern, it should be recognized that similar use of statistics and probabilities often are used under traditional tort rules,[133] such as determining contribution in comparative fault situations, apportioning damages in products liability suits, and evaluating life expectancy in wrongful death actions.[134] The use of statistics is essential if loss of chance is to be deemed a compensable interest; the alternatives, which include providing no guidance to the trier of fact or retaining the all or nothing approach,[135] should be avoided by courts[136] precisely because the essential role of statistical evidence is not addressed when applying traditional principles of tort law. Besides, science is capable of valuing loss of chance[137] and therefore use of scientific evidence is feasible.[138]

In addition, recognizing loss of chance as a protected interest may best serve public policy.[139] If a patient's life can be prolonged by proper medical treatment, the patient's opportunity to benefit from future medical breakthroughs and this may further extend the patient's life.[140] Ignoring this potential, as the all or nothing approach contemplates, is contrary to the purpose and goal of tort law.[141] Allowing loss of chance to be actionable even if such chance is not better than 50% places this cause of action squarely within the boundaries of traditional tort cases.[142] Failing to recognize loss of chance as a compensa-

131. Bruer, *supra* note 5, at 991. Professor Bruer argues, however, that if it is assumed that the same number of potential plaintiffs are on either side of the 51% threshold, then doctors will be liable for the same amount of damages under either rule. *Id.* Thus, loss of chance merely permits more plaintiffs to recover without any additional liability for doctors. *Id.*

132. *See, e.g.*, Fennell v. Southern Md. Hosp. Ctr., Inc., 580 A.2d 206, 213-14 (Md. 1990).

133. King, *supra* note 9, at 1385.

134. Smith, *supra* note 72, at 312.

135. *Id.*

136. King, *supra* note 9, at 1385.

137. *Id.* at 1387.

138. *Id.*

139. Feldman, *supra* note 58, at 150.

140. King, *supra* note 9, at 1373.

141. *Id.* at 1377.

142. *Id.* at 1376.

ble interest "distorts the loss-assigning role" of tort law and "strikes at the integrity of the torts system of loss allocation."[143]

As between the loss of chance approaches discussed above, the King approach is more equitable than the relaxed standard of proof method of the substantial chance and the Restatement approaches. Unlike the King approach, the relaxed standard of proof can cause confusion[144] and lead to overcompensating the plaintiff for the plaintiff's harm.[145] Moreover, the King approach does not require tinkering with the traditional concepts of tort law.[146]

V. CONCLUSION

Herbie Husker awaits your legal analysis of his situation and your advice. Nebraska law, more specifically *Steineke v. Share Health Plan, Inc.*, appears to support adopting loss of chance either as a cause of action or an element of tort damages. If the Nebraska Supreme Court chooses loss of chance as a separate cause of action, Herbie will recover because he needs to prove only that his doctor was the proximate cause of his loss of chance of survival. But, if the Court adopts loss of chance only as element of tort damages, Herbie will not recover because his loss of chance of survival was not preceded by a tangible, physical injury that resulted from his doctor's negligence.

Does Herbie Husker have a right to the same quality of care regardless of his initial chance to recover? If so, he deserves to have a legal remedy for the violation of that right. By recognizing loss of chance as a separate cause of action under the King approach, the Nebraska Supreme Court merely would provide a remedy for negligent medical treatment. The King approach acknowledges that any loss of chance is a compensable injury regardless of the initial chance of avoiding harm. By recognizing the King approach to loss of chance, this court can (1) create an incentive that will lead to better patient care, thereby prolonging patient life; (2) reduce the number of lawsuits, as doctors conform to their professional standard of care; and (3) lower damage awards to reflect only the amount of chance lost. Additionally, the loss of chance cause of action does not lower the standard of proof, and so comports with the requirements of proof and causation in Nebraska. Therefore, the Nebraska Supreme Court should adopt loss of chance as a separate cause of action to avoid an all-or-nothing approach that is contrary to the purpose and goal of tort law. By adopting loss of chance as a separate cause of action, doctors are asked only to not breach their professional standard of care.

143. *Id.* at 1377.
144. Boggs, *supra* note 29, at 436.
145. *Id.*
146. *Id.* at 432.

During the next few years, Nebraska medical malpractice attorneys will play a key role in molding the future of loss of chance in Nebraska. Therefore, Herbie's ability to recover damages will depend on the strength of representation, more specifically the ability to advocate the benefits of adopting loss of chance as a separate cause of action in Nebraska.

Patrick L. Evatt '98